



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 336 of 2004**

**NGORIKA FARMERS CO-OPERATIVE SOCIETY LTD.....
.....PLAINTIFF**

VERSUS

**JOHN KIARIE1ST
DEFENDANT**

**PETER MAINA KIMANI.....2ND
DEFENDANT**

**MARY WAMBUI KIMOTHO.....3RD
DEFEDANT**

RULING

The plaintiff filed an application dated 18th February 2005 brought by way of chamber summons under **Order XXXIX rules 1, 2, 3 and 9** of the **Civil Procedure Rules** seeking a temporary injunction to restrain the defendants, their agents and/or servants from using a cattle dip on land parcel number **NYANDARUA/NGORIKA/1441** pending the hearing and determination of a suit which it had filed against the defendants. The application was made on the grounds that the defendants had fraudulently registered the aforesaid parcel of land (hereinafter referred to as “**the suit premises**”) in the name of Rutara Cattle Dip while the land on which it was built belonged to the plaintiff. The defendants were also said to be using the dip in exclusion of all members of Ngorika Farmers Co-operative Society. The plaintiff alleged that it would suffer irreparable loss and damage if the order sought was not granted.

The application was supported by an affidavit sworn by the chairman of the plaintiff, Mr. Gideon Mwangi Rubia. He deposed that in the year **1967** the plaintiff was allocated a parcel of land known as **NYANDARUA/NGORIKA/846** and on 13th October 1996 the managing committee of the society decided to obtain a loan of Kshs.47,409/- from the Settlement Board for the purpose of purchasing and repairing permanent improvements on the aforesaid property. The said loan was given and the society drew up a list of permanent improvements that it required to undertake and on the aforesaid parcel number 846 there was a cattle dip known as ex-botler cattle dip. On 17th October, 1967 the Settlement Fund Trustees allocated funds for the said developments and the said parcel of land was purchased. The society then discovered that permanent improvement (PI) No. 831 and 846 had been omitted in the allotment letter and the chairman of the society wrote to the Director of Settlement Fund Trustees in respect of the same. He further deposed that the Land Adjudication and settlement officer Nyandarua visited PI 831 and 846 and discovered that PI 846 was a cattle dip and the area of the same was half an acre.

On 28th September 1995 the Director of Land Adjudication and Settlement wrote to the District Land

Adjudication and Settlement Officer Nyahururu confirming that PI 846 and 831 belonged to the plaintiff but the excisions were included in plots numbers 214 and 273 respectively. On 3rd October 1995 the District Adjudication and Settlement Officer Nyandarua wrote a letter to the Director of Lands and Settlement asking for further clarifications of plots 846 and 831 which had been apportioned to plots 214 and 273 as aforesaid. The Director responded and explained that PI 831 and 846 were combined with agricultural plots during title mapping and to separate them again mutation had to be carried out. He further advised that since plot number 214 in which PI 846 appeared had been discharged any mutation in respect of that plot had to be referred to the District Land Registrar Nyandarua.

On 2nd September 1977 the District Land Adjudication and Settlement Officer Nyahururu wrote to the District Land Registrar advising that since PI 846 (cattle dip) existed within plot 214 and having been omitted during the title mapping of the scheme the PI 846 was not reflected in the final Registry Index Map (R.I.M.) and plot number 214 having been discharged and the allottee having been issued with the title deeds the District Land Adjudication and Settlement Officer requested the Land Registrar Nyahururu to have PI 846 excised so as to be reflected in the R.I.M. The District Surveyor then subdivided plot number 214 which harboured PI 846 and as a result created **NYANDARUA/NGORIKA/1441**. That plot was in the name of "Rutara Cattle Dip", the subject matter herein.

Mr. Rubia further deposed that in concealment of material facts the defendants fraudulently registered themselves as the trustees of Rutara cattle dip and obtained title deeds for **NYANDARUA/NGORIKA/1441** instead of having the land registered under Ngorika Farmers Co-operative Society. He stated that neither the defendants nor the members of Rutara Cattle Dip were bonafide members of the plaintiff. He said that according to the list that had been submitted to the Permanent Secretary Ministry of Lands at Nairobi there were only 28 members.

When the committee of the plaintiff realised that the parcel of land **NYANDARUA/NGORIKA/1441** had been allocated to Rutara Cattle Dip illegally the plaintiff wrote to the District Commissioner Nyandarua among others and the District Commissioner advised the plaintiff to lodge a caution against the title. Mr. Rubia said that on 15th October, 2003 the society through its chairman lodged caution as above. The plaintiff in short was complaining that the defendant had unlawfully encroached into their property.

The defendant through John Kiarie Mbugua filed a replying affidavit and said that Rutara Cattle Dip is a self help group duly registered in the Department of Social Services and that it drew its members from the neighbouring community. Mr. Mbugua further deposed that members of Rutara Cattle Dip are also members of the plaintiff and as such they were fully conversant with the affairs of the plaintiff. He said that the society was formed in 1967 or thereabout with the primary objective of assisting its members in marketing their farm produce and repayment of loans which had been granted to them by the settlement fund trustees. He further stated that most of the members had cleared their loans with the settlement fund trustees and the plaintiff was in the process of being wound up and it had already disposed most of its assets including office plot, dairy and store plot, motor vehicle and tractor, a portion of Nyaituga cattle dip plot and other loose assets.

Mr. Mbugua explained the circumstances which led to the allotment of the parcel of land on which Rutara Cattle Dip is situated and said that the allotment was done on 23rd September 2002. Thereafter they paid the requisite charges and had the suit land excised from parcel number 214 and subsequently the property was transferred to themselves as officials of Rutara cattle dip on its behalf. The title deed is in the name of the defendants for and on behalf of members of Rutara Cattle Dip self help group. He said that the plaintiff was not in need of a cattle dip as it was in the process of being wound up having outlived its purpose. He further argued that as the registered proprietors of parcel number **NYANDARUA/NGORIKA/1441** their title was indefeasible and that the plaintiff's application had no merits. He further deposed that if the prayer sought by the applicant was to be granted, the operations of Rutara cattle dip would be grounded and that would occasion great lose to the members as their livestock would have nowhere to be dipped. He said that Rutara cattle dip had over 105 members who were responsible for the maintenance and running of the cattle dip. He denied that there was any fraud in their acquisition of **Parcel Nnumber1441**.

In her submissions, Miss Njoroge for the plaintiff/application stated that the plaintiffs had shown that it had a prima facie case with a likelihood of success and it stood to suffer irreparably if the orders sought were not granted. She sought to rely on the decision of **GIELLA VS CASSMAN BROWN CO. LTD.** [1973] EA 358.

Mr. Karanja for the defendants submitted that the application had no merits and was misconceived. He added that an interlocutory injunction could not be granted unless there was a prayer for injunction in the plaint. He sought to rely on **SOUTHERN CREDIT BANKING CORPORATION LTD VS CHARLES WACHIRA NGUNDO** Milimani Commercial Court Civil Case No. 1780 of 2000 (unreported).

In the plaint there are only two main prayers:-

(a) A declaration that **L.R. No. NYANDARUA/NGORIKA/1441** belongs to the plaintiff.

(b) An order to the Land Registrar Nyandarua to cancel Title number **NYANDARUA/NGORIKA/1441** and issue a new one in the plaintiff's name.

There is no prayer for any injunction whatsoever and I am in agreement with Mr. Karanja that the orders as sought by the plaintiff cannot issue in the circumstances.

Even if I was wrong on the above holding having carefully perused the affidavits that were filed by both parties herein there is no indication that the defendant fraudulently acquired the land in dispute. The property was lawfully allocated to the defendants by the settlement fund trustees and the settlement fund trustee has not been made a party to these proceedings. The defendants are now registered as proprietors of the suit premises for and on behalf of the members of Rutara cattle dip and their title, in the absence of any proven fraud in its acquisition is indefeasible. The defendants' legal rights over the land cannot be defeated by any equitable rights which the plaintiffs may be alleging over the same. In **CANE LAND LTD VS COMMISSIONER OF LANDS AND 5 OTHERS** Civil Application 311 of 1988 (unreported) the court of Appeal reiterated that under the provisions of section 28 of the Registered Land Act the rights of a registered owner could not be defeated by misconceived equitable rights of a stranger and in my view, this is the position in the present case.

If an injunction were to issue as prayed by the plaintiff the members of Rutara cattle dip will be highly inconvenienced. In my view, the plaintiff has not established a prima facie case with a likelihood of success as would entitle it to obtain an interlocutory injunction as sought. It has also not demonstrated that it stands to suffer irreparable loss if the said orders are not granted. For these reasons I dismiss with costs the plaintiff's application.

DATED, SIGNED AND DELIVERED at Nakuru this 6th day of February, 2006.

D. MUSINGA

JUDGE

6/2/2006

Ruling delivered in open court in the presence of Mr. Kiburi holding brief for Miss Njoroge for the plaintiff/applicant and

Mr. Karanja for the respondent.

D. MUSINGA

JUDGE

6/2/2006